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4. Appeal and Error (§ 974 (2)*)—Reversal of Chancellor for Failure to Order Issue Out of Chancery.—Where the chancellor, though not requested to do so, has failed to order an issue out of chancery in a proper case, and the Supreme Court on appeal is not satisfied that the ends of justice have been attained by the chancellor's decision, it will reverse and remand, with direction to impanel a jury to determine the issue.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 84; 15 Va.-W. Va. Enc. Dig. 546.]

5. Trusts (§ 41*)—Burden to Prove Parol Trust in Land.—One asserting the existence of a parol trust in his favor in land of which his adversary claims he is tenant under her has the burden of proof on the issue of existence of the trust.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 275; 17 Va.-W. Va. Enc. Dig. 994.]

Appeal from Circuit Court, Highland County.

Bill by Lillian V. Hook against A. J. Hook. From decree for defendant, plaintiff appeals. Reversed and remanded.

C. S. McNulty, of Roanoke, *John M. Colaw*, of Monterey, and *Jackson & Henson*, of Roanoke, for appellant.

Andrew L. Jones, of Monterey, and *Timberlake & Nelson*, *Curry & Curry*, and *L. Travis White*, all of Staunton, for appellee.

CRAIG-GILES IRON CO *v.* WICKLINE et al.

Nov. 20, 1919.

[101 S. E. 225.]

1. Boundaries (§ 40 (1)*)—Location of Disputed Land Question for Jury.—Where there was evidence in an ejectment suit tending materially to identify and locate the land held by defendants within plaintiff's grant, but such evidence was not conclusive, the court properly referred the question to the jury, whose verdict thereon would have been binding upon the court.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 598.]

2. Boundaries (§ 37 (1)*)—Evidence of Location of Land.—In ejectment, evidence held sufficient to show that the disputed land was within plaintiff's grant.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 910.]

3. Boundaries (§ 33*)—Burden of Proof of Location of Land.—In an ejectment action it was proper for the court to instruct that the burden was on plaintiff to identify and locate the land claimed by

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

defendants within the boundaries of the patent under which plaintiff claimed

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 609; 4 Va.-W. Va. Enc. Dig. 904.]

4. Evidence (§ 213 (1)*)—Offer to Purchase Adverse Claim.—An offer to purchase an adverse claim does not make the claim good.

5. Adverse Possession (§ 14*)—Necessity of Actual Possession.—Where plaintiff held under a senior grant of a 15,000-acre tract, such grant conferred upon plaintiff constructive possession of the whole tract, which constructive possession would continue good, regardless of defendants' junior grant, unless and until there was a disseisin, and to constitute such disseisin it was as necessary for defendants to take actual possession of some part of the land as if they had entered without any color.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 202, 209.]

6. Adverse Possession (§ 23*)—Cutting Timber.—Merely cutting and selling timber from wild land at widely separated intervals is not such actual possession as to constitute adverse possession.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 203.]

7. Adverse Possession (§ 16 (3)*)—Lands in a State of Nature.—Wild and uncultivated lands cannot be made the subject of adversary possession while they remain completely in a state of nature, but a change in their condition to some extent is essential.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 203.]

8. Adverse Possession (§ 14*)—Necessity of Actual Possession.—Where there is shown no actual possession of land claimed adversely to the owner, the claimant's acts of paying taxes, asserting title, and forbidding trespasses, do not aid the claimant; although when such possession is shown, proof of such acts is admissible, not as showing possession itself, but as showing its good faith, exclusiveness, notoriety, and hostility.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 201.]

9. Trial (§ 252 (4)*)—Applicability of Instructions as to Adverse Possession to Evidence.—Defendants, not having made out even a *prima facie* case of adversary possession, are not entitled to instructions on the subject.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 704, 705.]

10. Appeal and Error (§ 930 (4)*)—Presumption as to Issue Erroneously Submitted.—Where, although lower court judgment for defendants would be plainly right if based on one issue in the case, it is clear from the record that it may have been based upon another issue erroneously submitted, the judgment will be reversed and the cause remanded.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Circuit Court, Alleghany County.

Action by the Craig-Giles Iron Company against W. A. Wickline and others. Verdict and judgment for defendants, and plaintiff brings error. Reversed and remanded for new trial.

M. P. Farrier, of Pearisburg, and *C. P. Jones, Jr.*, and *C. B. Cushing*, both of Covington, for plaintiff in error.

R. B. Stephenson and *Geo. A. Revercomb*, both of Covington, for defendants in error.

BURKS et al. v. COMMONWEALTH.

Nov. 20, 1919.

[101 S. E. 230.]

1. Fish (§ 9*)—Repeal of Statute as to Nets.—Acts 1914, c. 151, p. 252, was intended as a complete substitute for and operated by implication to repeal Act March 7, 1912, c. 92, entitled "An act to prevent the catching of fish by gill nets or seines in the rivers and streams" in Rockbridge county.

[Ed. Note.—For other cases, see 15 Va.-W. Va. Enc. Dig. 941.]

2. Fish (§ 9*)—Ratification of Local Laws by Supervisors Is Valid.—Though Acts 1914, c. 151, relating to catching of fish by nets in Rockbridge county, contained no emergency clause, and therefore did not take effect until a lapse of 90 days, in view of Const. § 53, the board of supervisors of said county could validly ratify the act before the expiration of the 90 days.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 758.]

3. Statutes (§ 263*)—Retroactive Construction.—As a general proposition until the time arrives for a statute to take effect, all acts purporting to have been done under it are null and void.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 777.]

4. Statutes (§ 135*)—Amendment of Void Act.—A void act cannot be made the subject of a mere amendment.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 758.]

5. Criminal Law (§§ 220, 1031 (1)*—Sufficiency of Warrant Cannot Be Raised for First Time on Appeal.—Though the real subject of prosecution was violation of local law against catching fish with nets in Rockbridge county and the warrants charged defendants with a violation of the fish and game laws, the defect could have been corrected by amendment under Code 1904, § 4107; and, since objections that warrants do not apprise defendants with particular offense intended to be charged could not have been properly sustained after verdict and judgment, even in the trial court, such objections come too late when made for the first time on appeal.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 1257.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.